

The opinion in support of the decision being entered today was not written
for publication and is not binding precedent of the Board.

Paper No. 26

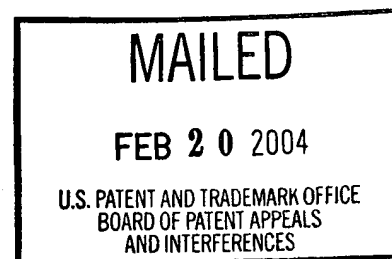
UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte WAYNE COHEN

Appeal No. 2003-1826
Application No. 09/393,473

HEARD: FEBRUARY 5, 2004



Before MCQUADE, NASE and BAHR, Administrative Patent Judges.
BAHR, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 13 and
14, which are all of the claims pending in this application.

We REVERSE.

BACKGROUND

The appellant's invention relates to a musical shaker novelty item having the shape of a miniature maraca adapted for attachment to a key chain or key ring. Further understanding of the invention may be obtained from claim 13, which reads as follows:

13. An ornament for a key chain or key ring comprising a hollow shell with pellets therein joined to an elongated handle, wherein said handle is fabricated of flexible material permitting resilient bending of said handle, said ornament having the overall shape of a miniature maraca having an overall length corresponding to the approximate width of a person's hand, and said ornament including a bore sized for receiving a key ring or key chain member.

The examiner relied upon the following prior art references of record in rejecting the appealed claims:

| | | |
|------------------------|-----------|---------------|
| Zadek | 2,364,581 | Dec. 5, 1944 |
| Isackson | 5,659,143 | Aug. 19, 1997 |
| Kralik et al. (Kralik) | 5,808,215 | Sep. 15, 1998 |

The following rejection is before us for review.

Claims 13 and 14 stand rejected under 35 U.S.C. § 103 as being unpatentable over Kralik in view of Isackson and Zadek.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejection, we make reference to the answer (Paper No. 19) for the examiner's complete reasoning in support of the rejection and to the brief (Paper No. 18) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, to the declaration of Wayne Cohen submitted under 37 CFR § 1.132 (Paper No. 14), and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

Kralik (see Figure 4) discloses a maraca or egg shaped shaker comprising a handle 44 and a first large shell part 42 with pellets therein, the shell part having a plug 52 glued into an opening 50 thereof. An internal hub 46 within the handle fits over a bottleneck extension 48 of the shell part and is joined thereto with an adhesive or glue to form an internal joint which is not exposed to the external surface of the device. This type of joinder overcomes the tendency of the egg-shaped shell to break along the seam when the instrument is dropped. Kralik points out that the instrument is "easy to handle and easy to store" (column 1, lines 60-61) but is silent with respect to the size of the instrument.

There appears to be no dispute that Kralik's instrument differs from the subject matter of claim 13 in three respects. Specifically, these differences are that (1) Kralik's handle lacks a bore sized for receiving a key ring or key chain member, (2) Kralik lacks disclosure of the size of the instrument and (3) there is no disclosure as to whether Kralik's handle is fabricated of flexible material permitting resilient bending.

Isackson discloses a hand-held percussive shaker instrument comprised principally of an elongated metallic tubular member 12, a first diaphragm 14a sealed over a first end 16a of the tubular member 12 and a second diaphragm 14b sealed over a second end 16b of the tubular member 12. According to Isackson (column 3, lines 21-23), the novel end cap configuration achieves a considerable acoustic gain, notwithstanding the small overall size of the instrument, which is approximately 4 inches in length (column 3, line 1). Isackson discloses that the instrument provides superior portability and adaptability and can be readily attached to a key chain or lanyard or carried in a pocket or purse, with either or both of the diaphragms having a small hole for receiving such key chain or lanyard (column 3, line 63, to column 4, line 3).

Zadek discloses a nursery toy or rattle comprising a gourd forming a rattle head 10 in which seeds 11 are placed and a handle 18 which comprises a rod of "either rigid or flexible material" (column 2, line 10). Zadek (column 2, lines 10-21) teaches that

[t]he rod is preferably of sufficient length to project through the bore 16 of the socket 13, abut the inner surface of the gourd shell opposite the opening 12 and still have a sufficient portion projecting beyond the socket outside the gourd to provide a suitable grip portion. The handle 18 is anchored in the socket 13 by placing an adhesive in the enlarged portion of the bore 16, which adhesive firmly attaches the handle in position with its inner end tightly pressed against the inside of the shell.

Unlike the examiner, we find no teaching or suggestion in any of the applied references, either alone or in combination, to modify Kralik's maraca to have an overall length corresponding to the approximate width of a person's hand so as to form an ornament for a key chain or key ring and to provide a bore in the handle for receiving a key ring or key chain member or to fabricate the handle of flexible material permitting resilient bending of the handle. In particular, while Isackson discloses a percussive shaker instrument which can be readily attached to a key chain or carried in a pocket or purse, Isackson specifically teaches a metallic tubular design having a diaphragm at each end, not a maraca shape having a hollow shell and a handle as called for in claim 13. Isackson provides no teaching or suggestion that a maraca shape having a hollow shell and a handle, such as that disclosed by Kralik, would be conducive to adaptation for attachment to a key chain or placement in a pocket or purse. We additionally find no suggestion in Zadek's rattle to fabricate Kralik's handle of a flexible material permitting resilient bending as also called for in claim 13.

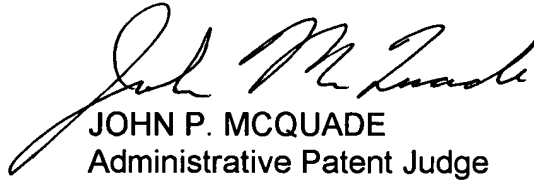
For the foregoing reasons, we conclude that the applied references are insufficient to establish a prima facie case of obviousness of the subject matter of claim 13 or claim 14 which depends therefrom.¹ Accordingly, the examiner's decision to reject claims 13 and 14 as being unpatentable over Kralik in view of Isackson and Zadek is reversed.

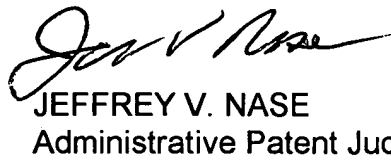
¹ It is thus unnecessary to discuss the declaration of Wayne Cohen in any detail in this decision.

CONCLUSION

To summarize, the decision of the examiner to reject claims 13 and 14 under 35
U.S.C. § 103 is reversed.

REVERSED


JOHN P. MCQUADE
Administrative Patent Judge


JEFFREY V. NASE
Administrative Patent Judge


JENNIFER D. BAHR
Administrative Patent Judge

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Application No. 09/393,473

Page 7

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TEAM 1

TO: PARALEGAL/LEGAL TECH

FROM: BAHR

APPEAL/INTERFERENCE NO. 2003-1826

DATE SUBMITTED: 2/11/04 TIME SUBMITTED 12:30 PM

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DECISION: Reversed

SPECIAL INSTRUCTIONS:

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